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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

PHONG HOANG HUYNH,
Petitioner and Respondent,
v.
THUY LAN THI CAO,
Respondent and Appellant.

A154556
(San Mateo County
Super. Ct. No. FAM0115274)

Respondent Thuy Lan Thi Cao (Cao) appeals from the court's order denying her attorney fees and costs and awarding Petitioner Phong Hoang Huynh (Huynh) attorney fees following Cao's postjudgment motion to modify an order for child support, visitation, and custody. She contends that the court erred in two respects: first, by awarding Huynh attorney fees when he did not request them and, second, by denying her request for attorney fees and costs under Family Code sections 2030 and 2032.¹ We conclude that the court abused its discretion by awarding attorney fees to Huynh and further find that it failed to make the requisite findings under section 2030 before denying Cao's request for attorney fees and costs. We therefore reverse both the award of attorney fees to Huynh and the order denying attorney fees and costs to Cao, and we remand for consideration of Cao's request under sections 2030 and 2032.

¹ All further statutory references are to the Family Code unless otherwise specified.

FACTUAL AND PROCEDURAL HISTORY

Cao and Huynh dissolved their marriage and later stipulated to the amount of monthly child support that Huynh would pay Cao. Less than a year after this stipulation, Cao served Huynh with a request for production of an income-and-expense declaration and requests for production of various financial documents. Cao also requested an order modifying child support, custody, and visitation and sought need-based attorney fees and costs under sections 2030 and 2032. Cao submitted evidence showing that she made approximately \$1,400 per month before taxes.

Huynh opposed the modification request, asked the court to deny Cao's request for attorney fees and costs, and asked the court to award him monthly child support. In support, Huynh filed an income-and-expense declaration indicating that he made \$9,902 per month before taxes. The court ordered the Department of Child Support Services to handle the child support award, entered an order regarding custody exchanges and the payment of certain shared parenting costs, made a disparity of income and ability to pay finding, and awarded Cao \$2,500 in attorney fees and costs.

Cao's attorney then filed a declaration requesting additional attorney fees. In this declaration, Cao's counsel claimed that Huynh misled the court about his income and consequently, the parties' son was not receiving the support he required. Cao's counsel requested that the court order Huynh to pay the balance of what Cao owed to counsel for his work. The court held a hearing, issued a temporary monthly child support award to Cao, continued the matter for an evidentiary hearing approximately seven months later, and reserved ruling on Cao's request for attorney fees.

Cao also filed a request for an order compelling Huynh to respond to the document requests that she had served and for \$5,425 in attorney fees as a discovery sanction under the Code of Civil Procedure. Huynh opposed the motion to compel on the basis that Cao's document requests were overbroad and unnecessary and argued that Cao had misused the discovery process. He also sought discovery sanctions against Cao or her counsel under Code of Civil Procedure section 2023.030, subdivision (a). At the hearing

on the motion to compel, the court ordered Huynh to produce some additional financial documents and reserved ruling on the attorney fees and sanctions requests.

The evidentiary hearing on Cao's modification motion occurred on multiple days over the course of many months. Prior to the first day of hearing, Huynh filed an updated income-and-expense declaration establishing that he had a higher adjusted gross monthly income than he had disclosed when Cao first filed her modification request because of additional self-employment and imputed rental income. Before the last day of the hearing, Huynh's counsel filed an updated declaration stating that from April 27, 2017 through November 14, 2017, Huynh spent \$37,679.50 in attorney fees as a result of Cao's counsel's abusive and dilatory litigation conduct. In this declaration, Huynh's counsel nonetheless affirmed that Huynh requested only \$27,230 in discovery sanctions under Code of Civil Procedure section 2023.030, subdivision (a), and counsel clarified that Huynh sought these sanctions against Cao's counsel, not Cao.

After the final day of the evidentiary hearing, the court accepted the recommendations of the Department of Child Support Services and increased Cao's child support award. The court subsequently issued an order granting Huynh \$37,679.50 in attorney fees, denying his request for sanctions, and denying Cao's request for attorney fees. Cao appealed.

DISCUSSION

I. The Court Abused its Discretion by Awarding Attorney fees to Huynh

The court awarded Huynh \$37,679.50 in attorney fees and denied his request for sanctions. Huynh concedes that an award of attorney fees was improper, but he suggests that the court's order should be reversed and remanded for a determination of the amount of sanctions he should receive. Cao contends that the court abused its discretion in awarding attorney fees to Huynh absent a request for such fees and that Huynh is not entitled to sanctions because he did not appeal the court's order denying him sanctions. We agree with Cao.

Need-based attorney fees in family law matters are available under sections 2030² and 2032³, and trial courts have considerable discretion in deciding whether to grant a party attorney fees and costs. (*Mooney v. Superior Court* (2016) 245 Cal.App.4th 523, 535 (*Mooney*)). However, attorney fees and costs under these statutes must be requested by a party and cannot be awarded on the court's own motion. (*Id.* at pp. 535–536.) Here, Huynh concedes that an attorney fees award to him under sections 2030 and 2032 is not proper, and the record demonstrates that Huynh requested discovery sanctions against Cao's counsel, not attorney fees.⁴ The court accordingly abused its discretion in awarding Huynh attorney fees that he did not request.

Huynh nonetheless requests that we remand this matter to the court to determine the amount of sanctions that he should be awarded. However, the court expressly denied

² Section 2030, subdivision (a)(1) provides that “the court shall ensure that each party has access to legal representation, including access early in the proceedings, to preserve each party's rights” by ordering one party to pay to the other party, “whatever amount is reasonably necessary for attorney fees and for the cost of maintaining or defending the proceeding during the pendency of the proceeding.” Subdivision (c) of section 2030 provides that “[t]he court shall augment or modify the original award for attorney fees and costs as may be reasonably necessary for the prosecution or defense of the proceeding, or any proceeding related thereto, including after any appeal has been concluded.”

³ Section 2032, subdivision (b) states: “In determining what is just and reasonable under the relative circumstances, the court shall take into consideration the need for the award to enable each party, to the extent practical, to have sufficient financial resources to present the party's case adequately, taking into consideration, to the extent relevant, the circumstances of the respective parties described in Section 4320. The fact that the party requesting an award of attorney fees and costs has resources from which the party could pay the party's own attorney fees and costs is not itself a bar to an order that the other party pay part or all of the fees and costs requested. Financial resources are only one factor for the court to consider in determining how to apportion the overall cost of the litigation equitably between the parties under their relative circumstances.”

⁴ Section 271 provides another source for awarding attorney fees as sanctions in family law matters. However, Huynh did not request sanctions under this statute, and it does not allow an award of attorney fees against Cao's counsel. (§ 271, subd. (c); *Orange County Dept. of Child Support Services v. Superior Court* (2005) 129 Cal.App.4th 798, 804.)

Huynh's request for attorney fees as sanctions, and Huynh did not appeal this ruling. As such, Huynh is not entitled to the affirmative relief he seeks. (*Preserve Poway v. City of Poway* (2016) 245 Cal.App.4th 560, 585.)

II. The Court Abused Its Discretion by Failing to Make Findings under section 2030

Cao sought need-based attorney fees and costs under sections 2030 and 2032 along with her motion for modification. The court awarded Cao \$2,500 in attorney fees and costs but reserved ruling on her request for additional fees and costs. In connection with her motion to compel further document production, Cao also sought \$5,425 of attorney fees as a sanction for misuse of the discovery process under the Code of Civil Procedure. Cao's counsel then supplemented her request for attorney fees in her counsel's declarations prior to the evidentiary hearing on her request for modification, citing sections 2030, 3120, and 271.

On appeal, Cao challenges only the court's denial of need-based attorney fees and costs, thus we address whether the court abused its discretion in denying these fees and costs under sections 2030 and 2032. (*Mooney, supra*, 245 Cal.App.4th at p. 535 [appellate review of an order granting attorney fees under sections 2030 and 2032 is for abuse of discretion]; *In re Marriage of Dietz* (2009) 176 Cal.App.4th 387, 406 [in the absence of a clear showing of abuse of discretion, the court's order following a motion for need-based attorney fees and costs will not be disturbed on appeal].)

"When a request for attorney fees and costs is made, the court shall make findings on whether an award of attorney fees and costs under this section is appropriate, whether there is a disparity in access to funds to retain counsel, and whether one party is able to pay for legal representation of both parties. If the findings demonstrate disparity in access and ability to pay, the court shall make an order awarding attorney fees and costs." (§ 2030, subd. (a)(2).) Because section 2030 requires the court to make findings regarding the existence of a disparity in access and ability to pay and states that the court shall make an order awarding attorney fees and costs if its findings demonstrate this disparity, the court's failure to make such findings constitutes reversible error. (*Mooney*,

supra, 245 Cal.App.4th at p. 536; *In re Marriage of Shimkus* (2016) 244 Cal.App.4th 1262, 1279–1280.)

Here, the court did not make findings under section 2030, and the record demonstrates a disparity in income between the parties that supports Cao’s contention that the court’s failure to make these findings was prejudicial. We thus reverse and remand for the court to make findings as to Cao’s request for attorney fees and costs under section 2030 and to decide whether an award of such fees and costs is warranted. (*In re Marriage of Shimkus, supra*, 244 Cal.App.4th at pp. 1279–1280.)

DISPOSITION

The order awarding Huynh \$37,679.50 in attorney fees is reversed. The order denying Cao attorney fees and costs is reversed and remanded for the court to make findings under section 2030 and to award attorney fees and costs to Cao under sections 2030 and 2032 if warranted.

BROWN, J.

WE CONCUR:

STREETER, ACTING P. J.

TUCHER, J.